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FILED

1970

Clerk, Supreme Court, Utah

In the
Supreme Court of the State of Utah

DESERT CENTERS, INC.,
Plaintiff and Appellant,

— vs. —

GLEN CANYON, INC., THEODORE
I. GEURTS, KYLE BREWSTER,
and HARRY D. PUGSLEY,
Defendants and Respondents.

Case
No. 9262

**BRIEF OF RESPONDENT
GLEN CANYON, INC.**

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Glen Canyon, Inc.*

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**BRIEF OF RESPONDENT
GLEN CANYON, INC.**

STATEMENT OF FACTS

The parties are referred to herein as they appeared below, and the use of the term defendant shall refer only to the defendant, Glen Canyon, Inc., unless otherwise specified.

This was an action by the plaintiff to quiet title to Lot 1, Plat A, of the official townsite of Glen Canyon, Utah. Glen Canyon, Inc., answered the complaint, denying the material allegations therein, setting forth several affirmative defenses, and bringing its own action against

the plaintiff by way of counterclaim to quiet title in the defendant Glen Canyon, Inc. The plaintiff's complaint also contained a second count wherein it sought to recover damages in the sum of \$300,000.00. The court found the issues against the plaintiff on both counts, and in favor of the defendant on its counterclaim, and quieted title to Lot 1, in the defendant.

The plaintiff relies upon a Warranty Deed (R. 24) from Glen Canyon, Inc., to the plaintiff Corporation, an Arizona Corporation, which deed is dated December 3, 1957, but not recorded in the books and records of Kane County until July 2, 1958, seven months later. Glen Canyon, Inc., asserted that there was no proper authorization for the issuance of the deed. In keeping therewith, Glen Canyon, Inc., executed and delivered a Quitclaim Deed to Harry D. Pugsley, "Trustee," one of the defendants in this action, on April 28, 1958, recorded June 26, 1958; he admittedly held title in trust for the use and benefit of Glen Canyon, Inc., until title could be determined as between the parties to this appeal, the court finding that the placing of record of the Quitclaim Deed was fully justified pending investigation (Findings of Fact paragraph No. 14).

A cursory examination of the Findings of Fact, Conclusions of Law and Judgment in this case vividly and positively manifest that the court looked to the entire transaction and relationship of the parties to this appeal, including the alleged Deed and authority therefore, and

the PRE-CORPORATION AGREEMENT between the parties to this appeal, (R. 137-139, Exhibit "B") which agreement the court rescinded, and which agreement is dated the 29th day of November, 1957, and under which plaintiff was to acquire title to said Lot 1.

STATEMENT OF POINT

POINT I.

THE COURT PROPERLY FOUND THAT PLAINTIFF'S DEED WAS INVALID.

ARGUMENT

POINT I.

THE EVIDENCE IS CLEAR AND CONVINCING THAT PLAINTIFF'S DEED IS INVALID.

Although the plaintiff claims the court erred in finding plaintiff's deed to be invalid, the plaintiff made no attack, except indirectly, on the finding of the court in paragraph 4 of the Findings of Fact wherein the court found, inter alia, "that there is no minute or resolution of Glen Canyon, Inc., authorizing the execution or delivery of the purported and alleged deed to the plaintiff." It is pointed out that the plaintiff never filed an exception to or took any action before the lower court in regard to any of the Findings of Fact, Conclusions of Law or Judgment as filed herein.

The plaintiff ignores this finding, but sets forth in the statements of facts in its brief at pages 1 and 2 a por-

tion of some minutes of the Board of Directors of the defendant which they claim authorized the issuance of the deed. The entire minutes are to be found at page 141 of the Record; the use of the word "them," therein, refers to William B. LaVey and Associates, NOT to Desert Centers, Inc., a corporation. The plaintiff introduced the minutes, relied on them, but plaintiff's witness, Mr. Gittlemen, President of Desert Centers, Inc., said, referring to the minutes, that "now whoever wrote this is the one, the only one that can explain what that means. I agree with you that it isn't a clear enough statement to reflect the entire transaction up in Salt Lake City" (R. 93). Further, to give the construction contended for by plaintiff would be in derogation of the PRE-CORPORATION AGREEMENT, and upon which plaintiff's \$300,000.00 damage claim rested. Also, there is an unexplained but rejected prior Quitclaim Deed between the parties, see R. 87 and 94-95. Moreover, the plaintiff was not even an existing corporation at the time of the issuance to it of these purported deeds, for the deeds and minutes all bear a date of December 3, 1957, or prior thereto, and Articles of Incorporation of Desert Centers were not signed until December 6, 1957 (R. 156), and not filed with the State of Arizona until December 30, 1957 (R. 157).

The defendant concurs with the law as set forth in the three cases cited by the plaintiff, namely: *Chugg v. Chugg*, 343 Pac. 2d 875, 9 Utah 2d 256; *Richmond v. Ballard*, 7 Utah 2d 341, 325 P. 2d 839; and *Northcrest, Inc., v.*

Walker Bank, 122 Utah 268, 248 P. 2d 692. These cases set forth the elements required to establish a prima facie case of the genuineness of a transaction, and once established the attacking party has the burden of showing the invalidity of the documents by clear and convincing evidence.

Let us assume for the sake of argument that the plaintiff is entitled to the prima facie position claimed by him. It is respectfully submitted that the defendant's evidence is clear and convincing. The trial court so found and its findings demonstrate that there was no doubt in the trial court's mind as to the correctness of that conclusion. This court in *Chugg v. Chugg*, supra, said at page 257:

This case being in equity, we review the evidence, but nevertheless indulge considerable credit to the findings of the trial court because of his advantaged position and will not disturb them unless the evidence clearly preponderates against the findings.

Although it is doubted that the burden of the plaintiff, the appellant herein, is satisfied by the bland assertion that there is "no evidence" to sustain the findings of the trial court, it is submitted it would have been more convincing and helpful if the plaintiff had shown what and where the "evidence clearly preponderates against the findings." For instance, what and where is the evidence that preponderates against the court's finding

“that there is no minute entry or resolution of Glen Canyon, Inc., authorizing the execution or delivery of the purported and alleged deed to the plaintiff”?

The plaintiff, however, is not entitled to the prima facie position claimed, for there is one salient difference in the cases cited and the facts hereunder, that of recording. Although the deed to the defendant Pugsley was issued after the deed to the plaintiff, the Pugsley deed was recorded prior to the time the plaintiff recorded the purported deed. Seven months elapsed before the plaintiff gave notice to the world, including Glen Canyon, Inc., of its claim to Lot 1; and then the plaintiff did so only after Glen Canyon, Inc., gave notice that it did not recognize the alleged deed of the plaintiff. During these seven months, and thereafter, the plaintiff failed to issue or tender any of its stock, failed to put a shovel in the ground or do any act toward the erection of a shopping center as contemplated under the PRE - CORPORATION AGREEMENT which the court rescinded; the reasons for such action are fully set forth in the court's findings.

As was said in *Greener v. Greener* 212 P. 2d 194, which was cited with approval in *Northcrest, Inc. v. Walker Bank and Trust Company*, supra, the trial court is in the better position to determine whether apparent inconsistencies are more apparent than real. The trial court resolved the inconsistencies and issues in favor of Glen Canyon, Inc.

This is not a case of a new Board of Directors of a corporation trying to override its predecessor Board as has been suggested by the plaintiff. It is a case of legal and proper procedure, performance and conduct. The trial court's findings are sound, and fully justified by the evidence.

CONCLUSION

In conclusion we respectfully submit that the Trial Court did properly grant judgment as filed.

Respectfully submitted,

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